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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34518

CENTRAL ILLINOIS RAILROAD COMPANY–OPERATION EXEMPTION–RAIL LINE OF THE CITY OF PEORIA AND THE VILLAGE OF PEORIA HEIGHTS IN PEORIA AND PEORIA HEIGHTS, PEORIA COUNTY, IL

STB Finance Docket No. 34636

PIONEER INDUSTRIAL RAILWAY COMPANY
– PETITION FOR DECLARATORY ORDER[1]

Decided: February 23, 2005

This decision: (1) denies a petition by Pioneer Industrial Railway Company (PIRY) to reject or revoke the notice of exemption filed by Central Illinois Railroad Company (CIRY) to operate an 8.29-mile rail line, known as the Kellar Branch, located in and owned by the City of Peoria (City) and the Village of Peoria Heights (Village) (jointly, the Cities), in Peoria County, IL; and (2) denies a petition by PIRY for a declaratory order to resolve certain related issues.

BACKGROUND

The Kellar Branch is located between milepost 1.71 and milepost 10.00, where it connects with the Peoria and Pekin Union Railway Company (P&PU). It was abandoned by the bankrupt Chicago, Rock Island and Pacific Railroad Company (Rock Island) in 1980. See Chicago, R.I. & P.R. Co. Abandonment, 363 I.C.C. 150 (1980). In 1984, the City, a noncarrier, acquired the abandoned line from the Rock Island Trustee and entered into an agreement with P&PU for the latter to provide service to the shippers on the line. See Peoria and Pekin Union Railway Company–Exemption from 49 U.S.C. 10901, Finance Docket No. 30545 (ICC served Sept. 24,

[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

1984) (P&PU Exemption). The City subsequently transferred to the Village an ownership interest in the portion of the Kellar Branch located within the Village's corporate limits. Although the Cities have used the "d/b/a" name Peoria, Peoria Heights & Western Railroad in connection with the line, the Cities have not obtained any authority from us, nor do they perform rail operations. P&PU assigned its rights under the agreement to PIRY in 1998, and PIRY obtained authority to operate the line. See Pioneer Industrial Railway Company–Lease and Operation Exemption–Peoria, Peoria Heights & Western Railroad, STB Finance Docket No. 33549 (STB served Feb. 20, 1998).

By a notice filed on June 28, 2004, and served and published in the Federal Register on July 28, 2004 (69 FR 45111), CIRY invoked the Board's class exemption at 49 CFR 1150.41 to operate the Kellar Branch at the request of the Cities. The exemption became effective on July 5, 2004.

On June 30, 2004, PIRY filed a petition to reject or revoke CIRY's notice of exemption or, alternatively, to stay its effectiveness. On July 1, 2004, CIRY replied in opposition. The Board denied the petition for stay in a decision served on July 1, 2004. On August 3, 2004, PIRY filed a supplement to its petition to reject or revoke, to which CIRY replied on August 23, 2004.[2] On December 13, 2004, PIRY also filed a petition for declaratory order in Pioneer Industrial Railway Co.–Petition for Declaratory Order, STB Finance Docket No. 34636, asking us to institute another proceeding to determine PIRY's status on the line and to construe the agreement between PIRY and the Cities as conveying to PIRY an interest comparable to a permanent easement. The Cities filed a joint reply on December 22, 2004, in which they argued that the Board should not issue a declaratory order because it lacks jurisdiction to interpret private agreements.

POSITIONS OF THE PARTIES

According to CIRY, its notice was filed at the request of the Cities and was intended to permit CIRY to replace PIRY, the current operator of the Kellar Branch, upon the expiration of PIRY's operating agreement with the Cities on July 10, 2004. Noting that PIRY has refused voluntarily to give up its authority to operate the line, CIRY stated that consummation of the notice of exemption would result in two authorized operators on the line. Citing City of Rochelle, IL– Notice of Exemption–Commencement of Rail Common Carrier Operations, STB Finance Docket No. 33587 (STB served June 2, 1998), CIRY argued that there is ample precedent for such dual authority and claimed that such an arrangement would be comparable to the ordinary trackage rights situation.

[2] Generally, a reply to a reply is not permitted. See 49 CFR 1104.13(c). Here, however, CIRY has not objected to the inclusion of PIRY's supplement and has filed a reply thereto. Therefore, in the interests of a complete record and because no party will be prejudiced, the supplement and the reply to the supplement will be included in the record.

According to CIRY, two carriers would be able to operate the Kellar Branch safely by coordinating traffic movements and, as an experienced rail operator, it would undertake the required coordination.

In its petition, PIRY argues that the notice should be rejected or revoked because: (1) it does not describe a transaction that is covered by 49 CFR 1150.41, et seq.; (2) the Cities lack the ability to enter into any agreement installing a new operator; and (3) the notice does not meet the criteria of 49 CFR 1150.41 and is false and misleading.

PIRY argues that the notice in question fails to describe a transaction governed by 49 CFR 1150.41, et seq. PIRY claims that the notice purports to replace the current operator on the line and alleges that it is styled in the form of a change in operators under 49 CFR 1150.41(c), but, PIRY contends, the notice impermissibly proposes instead to force the joint operation of the line. PIRY argues that a change in operators only occurs when one Class III carrier is being replaced by another as the sole operator of the line, and it points out that the Cities are not carriers. PIRY further asserts that CIRY cannot replace it on the line by means of a notice of exemption because PIRY has a continuing common carrier obligation on the line. PIRY also disputes that its operating agreement with the Cities has expired.

PIRY also contends that the agreement between the Cities and P&PU gave P&PU, and PIRY in 1998, an interest comparable to a permanent easement to operate the line, citing Maine, DOT – Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine), and City of Venice–Abandonment Exemption–In Venice, IL and St. Louis, MO, STB Docket No. AB-863X (STB served June 22, 2004) (City of Venice). Also, citing City of Venice, PIRY argues that the Cities, as landowners, cannot interfere with its common carrier obligation by installing another carrier on the line. PIRY points out that CIRY's notice admits that PIRY is the existing authorized common carrier on the line, and that no proceeding to terminate that authority was pending at the time the notice was filed.[3] Additionally, PIRY states that the notice does not claim that PIRY is not fulfilling its common carrier obligation, and PIRY contends that CIRY's notice admits that PIRY is actively operating the line by arguing for joint operations. In PIRY's view, the joint operation contemplated by the notice is not comparable to trackage rights and would result in numerous safety and other problems – not just for PIRY but for other entities, including carriers, shippers, and car owners.

[3] Since that time, the Cities have filed a request for waiver in anticipation of filing an application for adverse discontinuance to remove PIRY from the line and a decision has been issued in response to that request. See City of Peoria and Village of Peoria Heights, IL–Adverse Discontinuance–Pioneer Industrial Railway Company, STB Docket No. AB-878 (STB served Sept. 10, 2004) (Adverse Discontinuance). The Cities filed the application for adverse discontinuance on November 16, 2004.

Further, PIRY contends that the notice is false and misleading and, when viewed in light of the underlying agreement, fails to meet the requirements of the exemption. According to PIRY, the agreement between the Cities and CIRY is fatally flawed because it is temporary in nature, unclear as to the identity of the operator,[4] and does not name the Village (one of the line's owners) as a party to the agreement. PIRY further points out that the City has filed a notice of exemption in City of Peoria, IL, d/b/a Peoria Heights & Western Railroad–Construction of Connecting Track Exemption–in Peoria County, IL, STB Finance Docket No. 34395 to construct a connecting track from the northwest end of the Kellar Branch to a line recently acquired from the Union Pacific Railroad Company. According to PIRY, in that notice, the City has stated that the construction would allow the two shippers on the northwest end of the Kellar Branch to be served via the connecting track to the west. The lone shipper on the southeast end would continue to be served via the current connection with P&PU. According to PIRY, the Kellar Branch would then be abandoned and rail banked. Citing SF&L Railway, Inc.–Acquisition and Operation Exemption–Toledo, Peoria, & Western Railway Corp. between LaHarpe and Peoria, IL, STB Finance Docket No. 33996 (STB served Oct. 17, 2002), PIRY argues that use of a notice of exemption to operate the Kellar Branch in the instant proceeding would amount to an abuse of the Board's processes because the operation exemption was designed to facilitate operation of a line rather than its eventual abandonment.

In reply, CIRY disputes PIRY's contentions. First, it asserts that this transaction is, in fact, subject to section 1150.41 and meets all of its requirements. CIRY agrees that PIRY is currently authorized to operate the line, but argues that that right is not exclusive. CIRY admits that its agreement to operate the line should probably have included the Village as a party, but states that the City, the majority owner of the line, was acting on behalf of the Village. CIRY disputes that the agreement is vague regarding what entity will operate the line, arguing that CIRY is clearly the named operator therein. CIRY acknowledges that, if and when the connecting track is constructed, service on much of the Kellar Branch would ultimately cease and a portion of the line would be rail banked. It asserts, however, that there is nothing unlawful in utilizing an operation exemption to serve shippers while the connecting track project is being approved and built, and it adds that no shipper will lose rail service as a result of the proposal. Finally, CIRY acknowledges that, for PIRY to be removed from the line, Board authorization would be required.

[4] PIRY says it is unclear from the agreement whether DOT Rail Service, Inc. (DOT), which PIRY asserts is primarily a construction company and not a rail operator, or CIRY, will actually operate the line.

DISCUSSION AND CONCLUSIONS

Petition to Reject/Revoke

As the party seeking rejection or revocation, the burden is on PIRY to demonstrate that CIRY's notice contains false or misleading information, or that regulation is necessary to carry out the transportation policy of 49 U.S.C. 10101. See 49 CFR 1150.42(c); 49 U.S.C. 10502(d). In this proceeding, PIRY has failed to satisfy either burden.

Contrary to petitioner's claim, the transaction at issue is contemplated by 49 CFR 1150.41. CIRY's notice does not claim to be filed under 49 CFR 1150.41(c), as contended by PIRY. It is styled as a "Verified Notice of Exemption under 49 CFR 1150.41." That section broadly states that "except as indicated in paragraphs (a) through (d) of this section, this exemption applies to acquisitions or operations by Class III rail carriers under section 10902." The section then lists four specific transactions that "[t]his exemption also includes," one of which is the change of operators mentioned in subsection (c). The four enumerated transactions are in addition to, not in exclusion of, the operation of a rail line like the Kellar Branch by a Class III carrier like CIRY. Thus, there is no merit to this argument.

PIRY's argument that it possesses a permanent exclusive easement on the line that forecloses the ability of the Cities to contract with CIRY does not appear to be supported by the record. Unlike the lease agreements in State of Maine and City of Venice, the operating agreement between the Cities and P&PU (and PIRY as P&PU's assignee) does not appear to provide for exclusive operating rights or a continual, irrevocable easement. Rather, as the ICC noted in P&PU Exemption, the July 1984 agreement here can apparently be terminated by the Cities after 20 years or for cause. In any event, the operating authority granted by the exemption is permissive and conveys no specific property or contractual rights.

PIRY has also failed to demonstrate that the agreement underlying the notice is fatally flawed. While the Board does not interpret contracts between parties, we find no merit on this record to PIRY's alleged deficiencies. Although DOT is mentioned several times, CIRY is the carrier that is identified as having reached agreement with the Cities and which signed the agreement. And although CIRY concedes that the Village should have been named in the agreement, it correctly notes that its absence is not significant, as the City was acting on the Village's behalf. Lastly, the fact that the agreement is temporary does not render it unlawful.

We also find no merit to PIRY's "abuse-of-process" claims. PIRY essentially questions the propriety of CIRY's utilization of the class exemption in light of the Cities' plan to eventually abandon and rail bank much of the Kellar Branch. But there is nothing unlawful about CIRY's use of the

exemption process in conjunction with the Cities' plans to reconfigure the Kellar Branch. The notice of exemption in this proceeding authorizes CIRY to provide common carrier service in addition to PIRY's current operations. CIRY's authorization to serve the shippers on the line will continue until such time, if any, as the Board removes that authority. Thereafter, should the Cities' plan be approved, all existing shippers will continue to have access to rail service on the track proposed for construction. Thus, CIRY's operating exemption will ensure that shippers will have service during the construction process and beyond.

Petition for Declaratory Order

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority–Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Here, however, we see no reason to institute a declaratory order proceeding.

Despite PIRY's assertions to the contrary, there is no need to institute another proceeding to resolve any outstanding issues between these parties. Our decision here establishes the relative statuses of all of the parties. Generally, we defer in questions of contract interpretation to the courts and, to the extent that we would examine the arrangements between the parties here, we have already done so above. Our determination of whether the public convenience and necessity (PC&N) permits discontinuance of PIRY's operating authority will be made in Adverse Discontinuance. A finding that the PC&N so permits would remove our federal jurisdiction as a barrier to discontinuance and allow enforcement of the parties' operating agreement by a court of competent jurisdiction. For these reasons, PIRY's request for declaratory relief will be denied.

Additional Matter

In its July 1, 2004 decision, the Board, to assure coordination of dispatching of both carriers' operations on the line, required CIRY to certify to the Board that coordination protocols for dual operations were in place before CIRY could commence operations. By a letter dated July 6, 2004, CIRY certified that coordination protocols for dual operations over the Kellar Branch were in place as of that date. However, by a letter to the agency dated July 6, 2004, PIRY disputes this assertion and states that no coordination protocols are in place. PIRY asserts that, as of the date of the letter, there have been no discussions regarding coordination of dual operations, let alone any agreement.

As the Board stated in the July decision, CIRY cannot operate the Kellar Branch until coordination protocols are in place. Due to the dispute in the record, the parties should, within 30 days of the effective date of this decision, jointly certify that protocols are in place. If the parties cannot

reach agreement as to the terms of such protocols, they should bring their dispute to this agency for mediation. Such mediation will be conducted by the Board's Office of Compliance and Enforcement.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The supplement to the petition to reject/revoke and the reply thereto are accepted.

2. The petition to reject the notice of exemption or to revoke the exemption is denied.

3. PIRY's petition for declaratory order is denied.

4. Within 30 days, the parties should either provide the certification regarding coordination protocols or, if they cannot agree on such protocols, bring their dispute to the agency.

5. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary